

SERVICE DATE – APRIL 3, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 237X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
BALTIMORE COUNTY, MD

Decided: March 31, 2006

By petition filed on December 14, 2005, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903-05 to abandon its freight operating rights and rail freight service over 12.8 miles of a line of railroad between milepost UU-1.0 at Baltimore, MD, and milepost UU-13.8 at Cockeysville, in Baltimore County, MD. NSR also seeks to be exempted from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. Notice of the filing was served and published in the Federal Register (71 FR 168-69) on January 3, 2006.¹ Replies to the NSR petition were due by January 23, 2006. Various parties then made numerous filings, as follows.

On January 13, 2006, Mr. James Riffin filed a protest to the proposed abandonment. On January 23, 2006, the Maryland Transit Administration (MTA) filed comments in support of the proposed abandonment. On January 24, 2006, Mr. Riffin filed a notice of intent to file an OFA. On the same date, Mr. Riffin also filed a motion for a protective order, pursuant to 49 CFR 1104.14. On March 27, 2006, Mr. Riffin filed a supplement to his March 20, 2006 filing. On March 29, 2006, NSR responded to Mr. Riffin's March 20, 2006, and March 27, 2006 filings. A decision granting Mr. Riffin's motion for a protective order was served on February 8, 2006.

On January 27, 2006, Mr. Riffin filed a supplement to his protest. NSR replied on January 30, 2006, and February 1, 2006, respectively, to the protest and supplement. On February 6, 2006, Mr. Riffin responded to NSR's replies. On the same date, he also filed a motion for a "preliminary determination." NSR replied to that motion on February 8, 2006.

A letter in support of the proposed abandonment was filed on January 25, 2006, by Fleischmann's Vinegar Company, Inc. (FVCI). Letters opposing the proposed abandonment and

¹ As discussed *infra*, a Notice to the Parties served on February 10, 2006, and published in the Federal Register on February 16, 2006 (71 FR 8340), corrected the January 3, 2006 notice to identify the ending milepost as UU-13.8, rather than UU-12.8.

NSR's request for an exemption from the OFA provisions were filed on January 25, 2006, and on February 24, 2006, respectively, by Baltimore City Council member Bernard C. "Jack" Young and the Cockeysville Rail Line Shippers Coalition (Coalition).²

On February 24, 2006, Mr. Riffin filed comments on the Board's Environmental Assessment (EA).³ NSR filed a letter on March 14, 2006, to correct certain statements made in its petition. On March 16, 2006, CNJ Rail Corporation filed a Notice of Intent to Participate (without comment). On March 20, 2006, Mr. Riffin filed a petition to set aside an unapproved sale of a line of railroad. For the reasons discussed below, we will deny NSR's petition because of notice issues that have been raised.

BACKGROUND

The recent history of ownership and use of the line is as follows. Consolidated Rail Corporation (Conrail) sold the line to the Maryland Department of Transportation (MDOT)⁴ under an agreement dated May 1, 1990 for use as light rail commuter passenger service that is provided by MTA. According to NSR, Conrail retained a freight operating easement and entered into a related operating agreement with MTA to continue to provide rail freight service to the customers located on the line.

In CSX Corp. et al.–Control–Conrail Inc. et al., 3 S.T.B. 196 (1998), the Board approved, with certain conditions, the acquisition of control of Conrail by CSX Corporation and CSX Transportation, Inc., and Norfolk Southern Corporation and Norfolk Southern Railway Company. Pursuant to the Conrail transaction agreement, certain assets were allocated to Pennsylvania Lines, LLC (PRR). PRR's assets, in turn, were leased to and operated by NSR under the terms of an allocated assets operating agreement between PRR and NSR. On August 27, 2004, NSR acquired the freight operating rights over the line. See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company–Control and Operating Leases/Agreements–Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (Sub-No. 94) (STB served Nov. 7, 2003).

² The letter of opposition filed by the Coalition also included as attachments letters of opposition from Packard Fence Company, Mark Downs Office Furniture, Badolato Stone Supply, Blue Mount Quarry, Inc., and European Landscapes and Design.

³ The Board's Section of Environmental Analysis issued an EA in this proceeding on February 10, 2006, and requested comments by March 13, 2006. SEA did not recommend any environmental conditions in the EA.

⁴ According to NSR, MDOT describes itself as the umbrella organization for the MTA and other Maryland governmental transportation agencies. NSR states that MDOT and MTA are government agencies sponsoring or operating commuter mass transit service and have not held, do not hold, and do not intend to hold themselves out to provide rail freight service over the line.

There are currently three shippers located on this stub-ended line: E.C.C.A. Calcuim Products, Inc., d/b/a IMERYS Pigments and Additives Group, Baltimore Gas & Electric Company, and FVCI. The commodities that have moved over the line in recent years have been limestone, ethyl alcohol, and telephone poles. In 2004, NSR moved 193 carloads, but handled only 122 carloads in 2003. Because NSR's operations over the line have been marginally profitable or unprofitable, and so that MTA can use the line exclusively for light rail commuter passenger service, NSR seeks to abandon the freight operating rights and freight service over the line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The exemption process is designed to minimize regulatory burdens. However, a prerequisite to use of the exemption process is that proper notice be given of the proposal so that all potentially interested parties are given accurate information about the scope of "the transaction or service" in order to be able to challenge it. In the context of an abandonment exemption, this includes, at a minimum, accurately describing the parameters of the proposed abandonment, including milepost numbers, U.S. Postal Service Zip Codes through which the line runs, and any stations on the line. In his filings, Mr. Riffin has alleged that NSR's petition now pending before us contains several errors or inconsistencies. As discussed below, some of Mr. Riffin's allegations are incorrect and/or pertain to errors that were subsequently corrected. Nevertheless, taken as a whole, we believe that these errors or inconsistencies constitute ineffective notice of the proposed abandonment. Therefore, we will deny NSR's petition, without prejudice to refiling.

Mr. Riffin indicates that the ending milepost of the rail line should be UU-13.8, rather than UU-12.8. In its petition, NSR had used both UU-12.8 and UU-13.8 to identify the ending milepost of the line proposed for abandonment. NSR stated, in a subsequent pleading filed with the Board, that UU-12.8 was a typographical error and that the correct ending milepost is UU-13.8. Because notice of the petition for exemption was published in the Federal Register with the incorrect milepost number, a Notice to the Parties was served by the Board on February 10, 2006, and published in the Federal Register on February 16, 2006 (71 FR 8340), to indicate that the correct ending milepost is UU-13.8. Given the Notice to the Parties, the discrepancy in the petition regarding the ending milepost of the line would not be enough, standing alone, to warrant denial of NSR's petition for failure to provide adequate notice.

In addition to the milepost discrepancy, however, Mr. Riffin argues that NSR's Notice of Intent to abandon did not comply with the newspaper publication requirements specified at 49 CFR 1152.20(a)(4), requiring a Notice of Intent to be published at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the line is located. He also argues that the Notice of Intent did not comply with the form of notice requirements specified at 49 CFR 1152.21.

The regulations under 49 CFR 1152.20(a) and 49 CFR 1152.21 pertain to the filing of abandonment applications. There are special rules at 49 CFR 1150.60 that apply to abandonment petitions for exemption. The sample newspaper notices for abandonment exemption cases are at 49 CFR 1105.12, which requires that the notice appear only once in the newspaper rather than three times. NSR's Notice of Intent complies with the newspaper publication requirements applicable to abandonment petitions for exemption. But this does not mean that the content of the Notice of Intent was sufficient to inform the public of the scope of the abandonment proposal.

Mr. Riffin states that NSR indicated that the line proposed for abandonment traverses U.S. Postal Service Zip Codes 21030, 21065, and 21201, and includes the stations of Lutherville, Timonium, Texas, and Cockeysville. Mr. Riffin argues that the line does not pass through those Zip Codes, but through U.S. Postal Service Zip Codes 21217, 21211, 21209, 21210, 21212, 21204, 21093, and 21030, and includes the following stations: Woodberry, Mt. Washington, Bare Hills, Hollins, Lake, Ruxton, Riderwood, Lutherville, Timonium, Padonia, Texas, Cockeysville, and Ashland. NSR has not replied to these allegations.

As the petitioner, NSR has the burden to provide the Board with a complete and accurate record as to what is proposed to be abandoned. NSR also has an obligation to provide the public with accurate information about its proposal to ensure that all potentially interested parties and members of the general public have proper notice and the opportunity to participate in the Board's proceeding. Given the incorrect identification of the line's ending milepost in NSR's petition, and the unresolved questions regarding NSR's identification of the Zip Codes and stations that would be affected by the proposed abandonment, we are concerned that all interested parties and communities may not have received adequate notice of this proposed abandonment. Therefore, it would be inappropriate to go forward with this proceeding.

In addition, other issues have been raised which have not been adequately addressed by the parties. They include: (1) the "stranded" rail segment beyond milepost UU-13.8 that extends from Baltimore to the Maryland/Pennsylvania line; (2) the issue of whether approval of the transfer of Conrail's assets to MDOT in 1990 was necessary by the Board's predecessor, the Interstate Commerce Commission; and (3) the request to be exempted from the OFA provisions of 49 U.S.C. 10904.

In these circumstances, we will deny this petition without prejudice to NSR's refiling. Any new filing must be made under a new docket subnumber accompanied by a new filing fee. Our denial of NSR's petition for exemption moots the need to impose any labor protection or give any further consideration to potential environmental issues.

This decision will not significantly affect either the quality of human environment or the conservation of energy resources.

It is ordered:

1. The petition for exemption is denied.
2. This decision is effective on its service date.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary